Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

DARRELL A. PRICE, DAVID H. HOLLAND, ROBERT A. HOLL, OSWALD D. HOLSHOUSER, RAYMOND T. CARLTON, S. VANCE ELSTROM, and MARK E. CORWIN,

Petitioners,

vs.

CITY OF CHARLOTTE, NORTH CAROLINA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF RESPONDENT CITY OF CHARLOTTE, NORTH CAROLINA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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9 pp

QUESTIONS PRESENTED

1. WHETHER THE DECISION CONFLICTS WITH *HARRIS V. FORKLIFT SYSTEMS, INC.*

2. WHETHER THE DECISION PROPERLY HELD THAT THE PLAINTIFFS FAILED TO PROVE DAMAGES FOR EMOTIONAL DISTRESS.

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STATEMENT OF THE CASE[1]

The Respondent City of Charlotte, North Carolina (hereafter "City") is satisfied with the Petitioners' (hereafter "Plaintiffs") statement of the case, with the following exceptions:

- The City submits that the statement that "[t]he 1991 promotion process was represented by high level managers of the Police Department to be one that was completely free from any racial considerations" (Petition at p. 4) is not accurate. The City never represented to the Plaintiffs that the promotional process "was completely free from any racial considerations." The 1974 consent order in effect at the time of the 1991 promotions mandated that some consideration be given to race. The City neither stated nor implied to the Plaintiffs or anyone else that race would not be considered as a factor in the promotional process.

- The goal of the 1974 consent order for promotion of black officers to sergeant was 20%, rather than 25%. (Petition at p. 4)

- The characterization of the evidence offered by each of the Plaintiffs (Petition at p. 5) is misleading. The decision below contains an accurate summary of the testimony of each of the Plaintiffs describing the circumstances of

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[1] The Respondent is satisfied with the Petitioners' citations of reports of the opinions entered by courts below, jurisdictional statement and list of constitutional and statutory provisions. The Respondent has elected pursuant to Supreme Court Rule 24.2 not to include these items in its brief.

his alleged emotional distress. (Petitioners' App. at pp. 30-35)

ARGUMENT

1. THE DECISION DOES NOT CONFLICT WITH *HARRIS V. FORKLIFT SYSTEMS.*

The Plaintiffs' reliance upon a purported conflict between the Court of Appeals decision and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) is difficult to comprehend. *Harris* does not address at all the issue here; namely, the nature of the evidence necessary to sustain an award of damages for emotional distress in an action under 42 U.S.C. § 1983. The sole issue in *Harris* was the definition of "abusive work environment" under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* 510 U.S. at ___, 114 S.Ct. at 369, 126 L.Ed.2d at ___. This is a threshold question of liability under Title VII, and in no way either directly or by analogy implicates any aspect of damages for emotional distress or any other remedies available to claimants under federal civil rights statutes.

2. THE DECISION PROPERLY HELD THAT THE PLAINTIFFS FAILED TO PROVE DAMAGE FOR EMOTIONAL DISTRESS.

The Plaintiffs' assertion that the Court of Appeals decision fails to consider the circumstances surrounding the discrimination is doubly misguided. On the one hand, the decision does in fact address at great length the nature and circumstances of the relationship between the

actual constitutional violation and the emotional distress allegedly suffered by the individual Plaintiffs as a result. On the other hand, the circumstances of the constitutional violation starkly illustrate the failure of the Plaintiffs to prove any damages proximately resulting from it.

The "circumstances" of the constitutional violation of equal protection were that the City used race as a factor in the promotional process in which the Plaintiffs participated, but that none of the Plaintiffs would have been promoted even in the absence of such consideration of race. The "wrong" perpetrated upon the Plaintiffs was their exclusion from consideration for all available positions, *not* the fact that they were denied one of the positions. *See Regents of California v. Bakke*, 438 U.S. 265, 281, n. 14, 98 S.Ct. 2733, 2743, n. 14, 57 L.Ed. 750, ___ (1978).

The decision below analyzes the circumstances presented by each of the Plaintiffs in detail. (Petitioners' App. at pp. 30-35.) As to one group of Plaintiffs, the Court of Appeals noted that "their injuries, if any, are properly characterized as disappointment with their superiors, rather than emotional distress." (Petitioners' App. at p. 32.) In other words, they did not suffer any "emotional distress" as that term has been defined by Supreme Court precedent. As to another group, the court concluded that "their damages arose not from emotional distress as a consequence of invidious discrimination, but rather from the City's failure to promote them." (Petitioners' App. at p. 33.) These Plaintiffs could not recover damages because their emotional distress derived from their failure to receive promotions, rather than the constitutional violation of equal protection.

The Court of Appeals clearly considered "the nature and circumstances of the wrong and its effect on the plaintiff" in its analysis, as set forth in *Carey v. Piphus*, 435 U.S. 247, 263, 98 S.Ct. 1042, 1052, 55 L.Ed.2d 252, ___ (1978). *See also, Memphis Community School District v. Stachura*, 477 U.S. 299, 305-09, 106 S.Ct. 2537, 2542-44, 91 L.Ed.2d 249, ___ (1986). Indeed, the Court of Appeals' consideration of this point is more exhaustive than should be necessary. The simple point is that the nature and circumstances of the wrong did not have any effect on the Plaintiffs at all. Each of them applied for and failed to obtain a promotion that would have been denied to him even if the process had been entirely free of any consideration of race. Under these circumstances, it is difficult to conceive how any of the Plaintiffs even purport to have suffered emotional distress by reason of the constitutional violation.

CONCLUSION

The Plaintiffs' oblique arguments in favor of granting a writ of certiorari each go off on a tangent, rather than aim for the heart of the matter. This case has nothing to do with the definition of an abusive work environment or whether the decision of the Court of Appeals considered the circumstances surrounding the constitutional violation. Rather, the essence of issue which is the subject of the requested writ is whether any of the Plaintiffs presented sufficient evidence to support a claim of emotional distress precipitated by a constitutional violation.

The Plaintiffs do not challenge – or even mention – the Court of Appeals' application of the principles derived from other cases that have considered the viability of a claim for emotional distress supported only by a plaintiff's own testimony, including *Biggs v. Village of Dupo*, 892 F.2d 1298 (7th Cir. 1990) and numerous other cases cited in the decision below. (Petitioners' App. at pp. 20-29.) This omission is telling: The decision below is correct according to established law and should not be reviewed by this Court. The petition does not implicate any of the customary reasons set forth in Supreme Court Rule 10 for this Court to grant a writ of certiorari, such as a conflict with a decision of another circuit court or of this Court. In light of there being no evident reason to grant the writ of certiorari, the petition should be denied.

This the 14th day of January, 1997.

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